No. (1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

ROBERT H. TAYLOR,

Petitioner,

v.

CUMMINS ATLANTIC, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Paul H. Infinger
DUKES, WILLIAMS, INFINGER & MEEKS, P.A.
1105 Bay Street
Post Office Box 1027
Beaufont, South Carolina 29901-1027
(803) 521-5000

Counsel for Petitioner Robert H. Taylor

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

83pp

QUESTION PRESENTED FOR REVIEW

(A) Where the South Carolina Supreme Court has held that employee handbooks, manuals, pamphlets, or oral representation promulgated by an employer can alter the at-will status of its employees, stating that questions involving the creation of an employment contract by such evidence are issues for a jury, can the federal courts ignore the state law and reach conclusions which contradict the state law?

(B) Can the federal courts ignore binding state law in a motion for summary judgement involving civil issues which are strictly controlled by state law?

(C) Should a party in a civil suit be denied the right to a trial by jury because the federal courts have refused to apply the substantive state law where only state issues are involved?

LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner in this case is Robert H. Taylor, a resident of Columbia, South Carolina, represented by Paul H. Infinger, an attorney with Dukes, Williams, Infinger and Meeks, P.A., of Beaufort, South Carolina.

The Respondent is Cummins Atlantic, Inc., whose headquarters are in Charlotte, North Carolina, represented by Mason G. Alexander, Jr. and George D. Ellzey of Ogletree, Deakins, Nash, Smoak and Stewart of Columbia, South Carolina.

Pursuant to Sup. Ct. Rule 29.1 Petitioner states that Respondent Cummins Atlantic, Inc. is a privately owned franchise of Cummins Engine Company, a corporation.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ROBERT H. TAYLOR,
Plaintiff-Appellant,
. . . . . *Petitioner,*

v.

CUMMINS ATLANTIC, INC.,
Defendant-Appellee,
. . . . . *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit filed March 6,1995 is unpublished and attached as Appendix 1. The Order of the Court of Appeals for the Fourth Circuit denying Appellant's Petition For Rehearing and Suggestion for Rehearing En Banc filed April 4,1995 is unpublished and attached as Appendix 2.

The Order of the District Court for the District of South Carolina granting Respondent's Motion For Summary Judgment filed February 28, 1994 is reported at 852 F. Supplement 1279 and portions are attached as Appendix 3. The Order of the District Court denying Petitioner's Motion For Reconsideration filed March 29,1994 is unpublished and attached as Appendix 4.

JURISDICTION

The decision of the Court of Appeals was rendered on March 6, 1995. Appellant's Petition for Rehearing and Suggestion For Rehearing En Banc was denied by an Order filed April 4, 1995. The decision of the Court of Appeals is subject to certiorari review by virtue of 28 U.S.C. §1254 (1).

STATUTES INVOLVED

28 U.S.C. §1652 provides:

> The laws of the several states, except where the Constitution or Treaties of the United States or acts of Congress otherwise require or provide shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply.

Rule 56 of the Federal Rules of Civil Procedure provides:

The pertinent text of Rule 56 is set forth in Appendix 5.

STATEMENT

Petitioner Robert H. Taylor brought this action in the state court of South Carolina against his former employer Cummins Atlantic, Inc. on the grounds that his termination of employment was in breach of his employment contract created when his at-will status was changed by an employee handbook, manuals, commission agreements, and oral representations. The case was removed to the Federal District Court based upon diversity and jurisdictional claims for damages.

Petitioner Taylor began his employment with Cummins in November, 1959 as a parts clerk and was eventually promoted to engine and generator salesman in certain territory covering most of South Carolina until his wrongful discharge after thirty-one (31)

years of employment. His compensation was based on written agreements for commissions and commission schedules issued by Cummins and its predecessor as early as 1977 and followed by Cummins until 1990. In addition to the commission schedules issued by the previous owner, Cummins also issued an Employee's Handbook in 1981 and a Supervisor's Manual in 1984, both of which contain rules, policies and procedures outlining work violations and disciplinary procedures for the employees of Cummins. In addition, the Supervisor's Manual contains a certificate required to be signed by all employees, including Petitioner, acknowledging receipt of the Safety and Work Rules and Substance Abuse Policy and acknowledging that an employee's continued employment with Cummins is dependent upon the employee's following those policies and rules. If an employee violated a company policy or work rule, then the company expressly agreed it would

follow the disciplinary procedure it promulgated to enforce its rules uniformly. That proposition, says the South Carolina Supreme Court, is the basis for altering the at-will nature of an employment contract here as it has in approximately 33 other states who now follow this application of employment contract law.

In or about January, 1990, Cummins notified Petitioner that his commission schedule was changing and that in the future he would be subject to a new commission schedule which would increase his base salary but reduce his commissions earned on the same sales earned in prior years. In early May, 1990, Petitioner discussed the January commission schedule changes with the President of Cummins which resulted in a memorandum to a Cummins Vice-President and General Manager asking him to address the issues raised by Petitioner and his concerns as to the new commission schedule. The Vice-President became upset

with Petitioner for having discussed the commission schedule with the President and after two meetings dictated by the Vice-President, Petitioner was fired from his employment on the grounds that he was not a good employee after thirty-one (31) years of employment. The disciplinary process of giving a verbal warning, then written warning, and final warning status were not followed, in breach of his employment contract created by the handbook, manual, and oral representations.

Included in the Employee Handbook were "work rules and lists of violations" which provided that violations of the rules would result in disciplinary actions to be administered fairly and justly in accordance with the multi-step process. The Supervisor's Manual contains provisions similar to those of the Employee Handbook, but also contains disciplinary procedures which provide steps of progressive discipline to include a verbal warning and

a written warning and a final warning status. It further states that disciplinary action, if warranted, will be administered by a warning, time off with pay, or discharge, depending on the seriousness of the incident.

In addition, throughout his employment, Petitioner was told that as long as he did his job, did what he was supposed to, then he would have a job.

After a significant number of depositions were taken, Respondent moved for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there existed no genuine issue of any material fact as to Petitioner's claim for breach of an employment contract. The Motion For Summary Judgment addressed other issued alleged in the Complaint from which no appeal was taken. The memorandum and supporting affidavits, deposition excerpts and exhibits of Respondent exceeded approximately 300 pages. The

memorandum of Petitioner in opposition with supporting affidavits, deposition excerpts and exhibits exceeded approximately 200 pages.

On February 28, 1994, the District Court filed its Order granting Respondent's Motion For Summary Judgment as to all causes of action, including wrongful discharge, on the grounds that in the 500 pages of affidavits, deposition excerpts and exhibits, there was not one genuine issue as to any material fact regarding the wrongful discharge of Petitioner. The Order of the District Court was issued without a hearing of the parties and an opportunity to make oral arguments. The end result of the Order of the District Court is and was that Petitioner has been denied any opportunity to present his claim to a jury in accordance with the laws of South Carolina as set forth by the Supreme Court of South Carolina since 1987.

ARGUMENT

In 1987 the Supreme Court of South Carolina decided the case of Small v. Springs Indus., Inc. 292 S.C. 481, 357 SE 2d 452 (1987), in which a former at-will employee brought a breach of contract action against her former employer asserting that the employer did not follow the termination procedure set forth in an Employee Handbook when she was terminated. The Supreme Court of South Carolina stated in its opinion,

> "South Carolina, as a progressive state which wishes to see that both employer and employee are treated fairly, now joins those states (that have determined that a handbook can alter an at-will employment status). We hold that a jury can consider an employee handbook along with other evidence, in deciding whether an

> employer and employee had a limiting agreement on an employee's at-will employment status." 357 SE 2d. 452, at 455. "It is patently unjust to allow an employer to couch a handbook, bulletin, or other similar material in mandatory terms and then allow him to ignore these very policies as 'a gratuitous, non-binding statement of general policy' whenever it works to his disadvantage....If company policies are not worth the paper on which they are printed, then it would be better not to mislead employees by distributing them." Small I, at 455.

This decision began a new era in South Carolina employment law resulting in no less than nine successive decisions by the

South Carolina Supreme Court or the South Carolina Court of Appeals in at-will employment discharge cases involving handbooks, manuals, memorandums of agreement, posted notices and oral representations. All those cases have clarified and added to the original 1987 decision in Small I for the protection of employees in South Carolina.

A. District Court Decision:

After this case was removed to the Federal District Court and a substantial number of depositions taken, the Respondent moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. In granting Respondent's Motion for Summary Judgment, the Court did not allow oral arguments from the attorney for the Petitioner or Respondent.

In granting Respondent's Motion for Summary Judgment with regard to wrongful discharge, the District Court completely ignored, misconstrued, and misstated

principals of law established by the Supreme Court of South Carolina in wrongful discharge employee handbook cases. The District Court supported its decision with findings completely and totally opposite to the decisions of the South Carolina Supreme Court which have set guidelines for these decisions as to what are jury issues. The basic jury question in every wrongful discharge case involving handbooks or manuals is whether the employee was fired for good or just cause. The District Court decided that question on its own in this case even after reciting what issues should have been submitted to a jury.

In its first finding, the District Court found that the Petitioner's claim must fail because the Respondent did not distribute either the manual or handbook to Petitioner. Prior to oral argument before the Fourth Circuit Court of Appeals, the Supreme Court of South Carolina decided in King v. PYA/Monarch, Inc., ___ S.C. ___, 453

S.E. 2d 885 (1995), referring back to its 1987 decision in Small I, that a supervisor's manual intended for the supervisor's discretionary use only and not issued to employees can still create a binding employment contract altering the at-will status of an employee and that an employer may not insulate itself from liability by failing to circulate the manual to employees. That case further held that written conditions in an employment contract may be waived or modified by oral agreements even when the contract states that all changes must be in writing, which is a jury question. The King decision had almost identical facts and issues as this case and was properly brought to the attention of the Court of Appeals before oral argument on January 30, 1995.

Second, the District Court held that the court must look to general principles of contract law in order to analyze

Petitioner's claim for breach of an employment contract. This finding by the District Court that traditional contract elements and principles are applicable to employee handbook contracts in South Carolina had already been overruled in at least two previous decisions and at least one additional case which were Small I; Miller v. Schmid Laboratories, Inc., 414 S.E. 2d 126 (S.C. 1992); and Fleming v. Borden, Inc. et al., 450 S.E. 2d 589 (S.C.,October, 1994).

In Miller a former at-will employee brought an action against his former employer for wrongful termination relying on procedures stated in the employee handbook. Before sending the case to the jury, the state trial judge in South Carolina charged the jury with traditional contract principles, and specifically the definition of bilateral contract. The Supreme Court of South Carolina held that traditional "meeting of the minds" contract

concepts are not applicable and are not the law under Small I in employee handbook cases in South Carolina. 414 S.E. 2d 126, at 127. In Fleming, the South Carolina Supreme Court held that under the Small I decision the contract of employment created by an employee handbook is a unilateral contract with "no mutuality of obligation; there is only one promisor and one promisee for whom the contract creates a legally enforceable right". "Under older common law a unilateral contract could be terminated or modified by the promisor at any time prior to completion of performance. Under the modern laws contract, the promisor does not enjoy the unfettered right to modify or terminate a unilateral contract prior to completion". 450 S.E. 2d 589, at 594.

The District Court next found that the Petitioner could not prevail on his breach of contract claim unless he could establish that the Respondent made an offer to him to

alter the at-will nature of his employment. That specific finding of the District Court had been thrown out in the 1987 Small I decision which said that most employment agreements are unilateral agreements in which the employer makes an offer or promise to hire in return for specified benefits and wages. The employee accepts the offer by performing the act on which the promise is impliedly or expressly based and whose action or forbearance in reliance on the employer's promise is sufficient consideration to make the promise legally binding. 357 S.E. 2d 452, at 454.

The District Court further found in its Order that the evidence is undisputed that Respondent did not distribute or intentionally publish either the manual or the handbook to Petitioner. There was no testimony or evidence before the District Court that the Employee Handbook was not distributed to the employees. The Supervisor's Manual which Petitioner

implicitly received contained a written receipt required to be signed by Petitioner that he understood the policies and procedures and substance abuse policies and that his continued employment was conditioned on his following those rules and policies. In King, the South Carolina Supreme Court held that where the employer alleged that it had developed a supervisor's manual containing policies and procedures for the use of its managers only and did not distribute the manual to the employees, its provisions were still binding upon the employer and altered the at-will status of the employee. 453 S.E. 2d 885, at 888. These were almost the exact facts and issues in this case.

Next, the District Court held that the commission agreements which had been in effect since at least 1977 through 1990 could not alter the at-will status of Petitioner and that his reliance thereon was clearly misplaced because neither

document contained any language which could be read to alter the Petitioner's at-will employment status. However, contrary to this finding, the South Carolina Court Of Appeals in its Hendrix decision in April, 1994 held that oral representations and memorandums memorializing employment discussions, even when they contain statements that they are not employment contracts, can and did form the basis for the modification of the at-will status of an employee creating an employment contract. Hendrix v. Eastern Distribution, Inc., 446 S.E. 2d 440 (S.C. App. 1994)

Finally, the District Court made another error attempting to support its summary judgment Order by holding that oral assurances cannot alter the at-will status of an employee. That holding was specifically overruled in King, Hendrix and Small I. In Small I at 454 the Supreme Court held that it was for the jury to decide whether the handbook, the bulletin

and the oral assurances constituted an employment contract. In Hendrix at 443-445 the South Carolina Court of Appeals held that a written memorandum setting forth certain terms of the oral employment contract which are in dispute are issues of fact for jury determination. In King at 888 the Supreme Court held that rules and regulations and oral assurances that the company followed a progressive disciplinary procedure and that an employee could not be terminated without cause were sufficient to support a finding that a contract of employment was created for the employee.

The District Court further stated that oral assurances of one particular aspect of employment could not alter the at-will status of an employee. The District Court's reasoning here was also overturned one month later in Hendrix at 443-445. The South Carolina Court of Appeals found that where the employer assured the employee when it hired her that she would not be

terminated so that the employer could avoid its agreement to pay her commissions, her later termination raised the specific issue of whether or not she was terminated to avoid paying her the commissions. Likewise, the South Carolina Court of Appeals had already decided Bookman v. Shakespeare Co., 442 S.E. 2d 183 (S.C. App. 1994) that a sexual harassment policy posted on a bulletin board altered the employee's at-will status to the extent that she could not be terminated for filing a sexual harassment complaint, from which she was protected by the posted policy.

B. Fourth Circuit Court of Appeals:

In the beginning of its Opinion the Fourth Circuit Court of Appeals stated the correct issues in this case were that Petitioner contended his at-will employment status was transformed into a contractual relationship, and that Respondent maintained that Petitioner remained an at-will employee and could be

discharged at any time without cause. This is precisely what the South Carolina Supreme Court has determined are the basic issues for a jury to determine in South Carolina since 1987. Somehow the District Court found these were not jury issues and decided these questions as a matters of law. The South Carolina Supreme Court has held that employee handbooks, policies, and other similar materials which contain general policy statements, couched in permissive language, do not preclude other memorandums, posted policies, oral representations and provisions such as the disciplinary procedure and work violation policies from altering the at-will status of a work force, and the existence and application of such matters raise factual issues to be determined by a jury. King; Fleming; Bookman; and Small I .

The federal courts, however, then went to great lengths to deny Taylor a jury trial by deciding on the merits the very

issues which the Supreme Court of South Carolina said were issues only for the jury.

In its eight page Opinion the Court of Appeals cited only three South Carolina cases, two of which were only remotely related to the facts in the present case. The Court of Appeals did cite Small I for the proposition that there was a disclaimer in the handbook which would defeat the Petitioner's claim. However, the proposition that an inconspicuous disclaimer will defeat a wrongful discharge claim had already been decided to the contrary in Small I; Fleming; Hannah v. United Refrigerated Services, Inc., et al., 305 S.C. 394, 430 S.E. 2d 539 at 541,542 (S.C. App. 1993), and Kumpf v United Telephone Co. of the Carolinas, Inc., ___S.C.___,429 SE 2d. 869 (S.C. Ct. App. 1993). The South Carolina Court of Appeals in Fleming at 596 held that the employer's handbook contained a disclaimer

which the Plaintiff wanted the judge to construe as a matter of law. The South Carolina Court of Appeals agreed with the trial judge that it is for the jury to decide whether a handbook that contains both promissory language and a disclaimer should be viewed as inherently ambiguous and, as with any question of fact, is primarily a matter for the jury to decide. In the Fleming decision at 595 the South Carolina Court of Appeals discussed two decisions of the Federal District Court in South Carolina which, as in this case, had attempted to interpret South Carolina wrongful discharge law and the South Carolina Court of Appeals declined to follow either decision.

Paragraph II (A) of the Fourth Circuit Court Of Appeals Opinion states that Petitioner cited no specific language from either handbook or the manual establishing that an employment contract was created but simply relied on the allegation that

provisions of the handbook and/or manual applied to him, thereby altering his at-will status. Again, this is the foundation of South Carolina law the federal courts in this case would not accept. The Fourth Circuit Court then goes into great detail in listing sections of the Employee Handbook and Supervisor's Manual which were not the main thrust of Petitioner's reliance in establishing alteration of his at-will status. As the South Carolina Supreme Court has pointed out in the many decisions cited herein, if there are company work rules and regulations and a disciplinary policy and procedure observed by the company, then those representations can alter the at-will status of the employee. The Supervisor's Manual of Cummins contains a receipt required to be signed by each employee, including Petitioner, stating that they understand their continued employment with Respondent is dependent upon their following the

policies and rules of the company and that the employee acknowledges receipt of the safety and work rules and substance abuse policy. Both the Employee Handbook and Supervisor's Manual had multi-step disciplinary penalties, i.e., verbal warning, written warning and final warning status. Did Cummins have a legitimate cause to terminate Petitioner, and even if they may have, did they follow their own procedures? That is just one of the issues for the jury that the District Court and Court of Appeals have taken away from Petitioner. That language was exactly the kind stated in the King case and consistently referred to as issues for a jury in almost every case since Small I.

The Fourth Circuit Court of Appeals went one step further to assert that even if they assume that Taylor's at-will status was altered, he received the procedure to which he was entitled. The issue of whether or not the company followed its own

procedure is a jury issue. Leahy v. The Starflo Corp., ___S.C.___,431 S.E. 2d 567 (S.C. 1993).The Fourth Circuit Court of Appeals, however, decided on their own that the procedure had been followed when, in fact, it was not. This is another reason to reverse the decision of the District Court and Court of Appeals and grant Taylor a trial before a jury, to which he is entitled.

CONCLUSION

One of the foundation blocks of our judicial system is that our citizens are entitled to a trial by jury unless there is some compelling reason to deny to a citizen that right. The principle that a federal court is bound by the state law and state precedence dealing with state law applies, of course, to actions removed from a state to a federal court, as well as to actions originally instituted in a federal court. The rule that a federal court where it applies state law must follow the state law

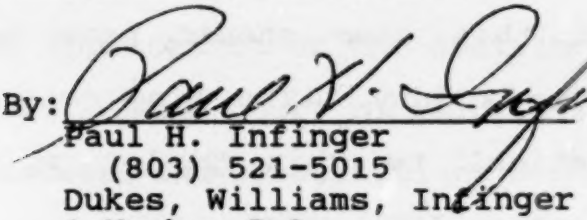
as declared by the Supreme Court of that state is an application of the doctrine of *stare decisis*. State court interpretations of state statutes and constitutions control federal courts, and various other matters of primarily local interests are controlled by state law when they arise in federal court.

In order to fairly and reasonably decide issues arising under state law, the federal court must be willing to set aside its own interpretation of how it thinks the law should be and apply the law as the state Supreme Court has already decided. This case is boiling over with issues for a jury to determine and there is ample guidance and law in South Carolina which require such a finding. Only the most obvious jury issues have been discussed in this Petition which raise genuine issues as to material facts necessary for a jury determination, not summary court decision. Even a cursory reading of the Small I

decision, together with King, will reveal that this case should have been tried before a jury. The King case is almost identical to this Taylor v. Cummins Atlantic, Inc. case.

The Petitioner respectfully submits that the decision of the United States District Court, affirmed by the Court of Appeals, should not be allowed to stand because they are based on erroneous legal and factual findings in conflict with the law of South Carolina, resulting in the denial to Petitioner a right to a trial by jury. To allow these decisions to stand would generally establish a federal common law standard of employee handbook law in the State of South Carolina in conflict with South Carolina law. For these reasons Petitioner urges the Court to grant this writ.

Respectfully submitted,

By: 

Paul H. Infinger
(803) 521-5015
Dukes, Williams, Infinger
& Meeks, P.A.
Post office Drawer 1027
Beaufort, SC 29901
Attorney for the Petitioner

FILING AND MAILING CERTIFICATE

I hereby certify that on this 3rd day of July, 1995, the required copies of this Petition For Writ Of Certiorari were filed with the Clerk's Office of the United States Supreme Court and further certify that the required copies of the same were mailed via first class to all parties required to be served pursuant to Rule 29.5 of the Supreme Court Rules.

By: _____
Paul H. Infinger, Esquire
DUKES, WILLIAMS, INFINGER & MEEKS, P.A.
1105 Bay Street
Post Office Drawer 1027
Beaufort, South Carolina 29901-1027
(803) 521-5015

To:

Mason G. Alexander, Jr. Esquire
George D. Ellzey, Esquire
Attorneys for Respondent
1426 Main Street
18th Fl. Palmetto Center
Columbia, South Carolina 29211
(803) 252-1300

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ROBERT H. TAYLOR,
Plaintiff-Appellant,

v.

CUMMINS ATLANTIC, INCORPORATED,
Defendant-Appellee.

No. 94-1596

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Dennis W. Shedd, District Judge.
(CA-92-1850)

Argued: January 30, 1995

Decided: March 6, 1995

Before HALL and HAMILTON, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Paul Hugh Infinger, DUKES, WILLIAMS, INFINGER & MEEKS, P.A., Beaufort, South Carolina, for Appellant. Mason Gardner Alexander, Jr., OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Columbia, South Carolina, for Appellee. **ON BRIEF:** Herbert W. Louthian, LOUTHIAN & LOUTHIAN, Columbia, South Carolina, for Appellant. E. Daniel Ellzey, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Robert Taylor (Taylor) sued Cummins Atlantic, Incorporated, (Cummins) for, *inter alia*,[1] breach of employment contract. The district court granted summary judgment in favor of Cummins pursuant to Fed. R. Civ. P. 56(c). *See Taylor v. Cummins Atl., Inc.*, 852 F. Supp. 1279 (D.S.C. 1994). Taylor appeals, asserting that Cummins altered his at-will employment status, thereby transforming him into a contractual employee and that Cummins breached his employment contract in discharging him. We affirm.

I.

Taylor was employed by Cummins commencing in 1959, but was eventually discharged in 1991. Cummins' reason for terminating Taylor was poor work performance, specifically stating that customers had complained about Taylor and that he experienced problems with completing paperwork, returning telephone calls, modifying goods without approval, and missing work on alternating Fridays to the detriment of business. Contending that he was improperly discharged, Taylor posits that his at-will employment status was transformed into a contractual relationship based, *inter alia*,[2] on an employee handbook (handbook) and supervisor's manual (manual). The gravamen of his argument is that the handbook and manual contained a disciplinary procedure for discharging employees that Cummins failed to follow. Given that Cummins failed to comply with its own procedures in discharging him, Taylor asserts that Cummins breached his employment contract. Conversely, Cummins maintains that Taylor remained an at-

[1]While other claims were unsuccessfully asserted against Cummins, the only one challenged on appeal is the breach of employment contract claim.

[2]*See* n.3, Section II.C.

will employee, and thus he could be discharged at any time without cause. Additionally, Cummins asserts that it followed the disciplinary procedure in substance with respect to Taylor's discharge; thus, according to Cummins, even accepting Taylor's contention that the handbook and manual altered his at-will status, Taylor received the procedure to which he was entitled.

II.

Rule 56(c) requires that the district court enter judgment against a party who, "after adequate time for . . . discovery fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To prevail on a motion for summary judgment, Cummins must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) that it is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue of material fact has been raised, we must construe all inferences in favor of Taylor. *See id.* 257-58. If, however, "the evidence is so one-sided that one party must prevail as a matter of law," we must affirm the grant of summary judgment in that party's favor. *Id.* at 251-52. Taylor "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." *See Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). To survive Cummins' motion, Taylor may not rest on his pleadings, but must demonstrate that specific, material facts exist that give rise to a genuine issue. *See Celotex Corp.*, 477 U.S. at 324. As the *Anderson* Court explained, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 244. Our review over a grant of summary judgment is plenary. *See Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1260 (4th Cir. 1993).

A.

Taylor cites no specific language from either the handbook or the manual establishing that an employment contract was created, but simply relies on the allegation that provisions of the handbook and/or

manual applied to him, thereby altering his at-will status. The disciplinary procedure on which Taylor relies provides:

> Certain rules of general conduct and performance have been set up to assure the orderly and proper operation of our company. The list of violations that follow cannot cover all circumstances and it is not intended to be complete. *It merely serves as a guideline*, as we expect employees to exercise responsibility and good judgment in their personal actions. Violations such as these will result in disciplinary action which will be administered fairly and justly. It *may* take the form of a warning, time off without pay, *or* dismissal, *depending* upon the seriousness of the incident.

(J.A. at 130) (emphasis added). Then a recitation of illustrative violations is provided.

Additionally, the manual provides:

> The Company has developed the following disciplinary procedures to motivate rather than discourage its employees. Supervisors are *encouraged* to utilize this procedure; *deviations must be approved* by one of the Vice Presidents.
>
> . . . .
>
> Give a verbal warning as a problem develops with an employee. Document the warning and retain it in the Department/Branch for future reference. Forward this information to Personnel for review. Give a written warning . . . if little or no improvement is shown within a reasonable period of time. Include previous discussion and/or warnings. Place the employee on a final warning status (usually 30 days). Emphasize to the employee that termination will be *recommended* if no noticeable improvement is shown during the final warning period. Have the employee read and acknowledge receipt of the warning.

(J.A. at 145) (emphasis added). Generally, under South Carolina law, "[t]he doctrine of employment at will . . . allows an employer to dis-

charge an employee without incurring liability for good reason, no reason, or bad reason." *Culler v. Blue Ridge Elec. Coop., Inc.*, 422 S.E.2d 91, 92 (S.C. 1992). The district court held "that there is nothing in the [m]anual or [h]andbook which can reasonably be read as altering [Taylor's] at-will status." *Taylor*, 852 F. Supp. at 1287 n.10.

We agree with the district court. Even assuming, as we do, that the handbook and manual were disclosed to Taylor, we conclude that nothing in either publication reasonably can be read as altering Taylor's at-will employment status. While these policies articulate modes for discipline, their language is permissive, not compulsory. For example, the handbook states that violations "*may* take the form of a warning, time off without pay, or dismissal, depending on the seriousness of the incident." (emphasis added). Additionally, this language provides for a variety of consequences, rather than prescribing that a particular consequence must follow; moreover, these consequences "depend" on the gravity of the offense. This dependence means that there is flexibility in administration; the language does not provide that discipline *must* take any particular form. Likewise, while the manual provides that deviations must be approved, it also provides that supervisors "are *encouraged* to utilize this procedure." (emphasis added). The supervisors are, therefore, not compelled to utilize the procedure. Furthermore, implicit in the fact that deviations must be approved is the fact that deviations are permissible, and if permissible, then they are not mandatory. We conclude nothing in this language purports to alter Taylor's at-will status. Therefore, Taylor's employment status was terminable at will, and the district court properly granted summary judgment in favor of Cummins. *See White v. Roche Biomedical Lab., Inc.*, 807 F. Supp. 1212, 1215 (D.S.C. 1992), *aff'd*, 998 F.2d 1011 (4th Cir. 1993) (*per curiam*) (unpublished).

Apart from containing no language tending to alter Taylor's at-will employment status, we observe, although not necessary to our decision, that the manual contained an express disclaimer in the first paragraph of the first page reciting that "[t]he information in this manual addresses many but not all, of the aspects of employment with CUMMINS ATLANTIC INC. It is not a contract of employment and should not be interpreted as such." (J.A. at 137). South Carolina law gives affect to such disclaimers. *See Small v. Springs, Indus.*, 357 S.E.2d 452, 455 (S.C. 1987). The Supreme Court of South Carolina

has noted that if nothing in the challenged instrument tends to alter the at-will status, then summary judgment is properly granted. *See Epps v. Clarendon County*, 405 S.E.2d 386, 386-87 (S.C. 1991) (affirming a grant of summary judgment in favor of the employer and rejecting the plaintiff's contention that an employee handbook distributed to him altered his at-will status because "no provision [in the handbook] might otherwise be construed as altering an employee's at-will status").

B.

In addition to the disciplinary procedure, Taylor also asserts that because some provisions of the handbook and/or manual applied to him, this application transmuted his employment status from one of at-will to contractual. For instance, Taylor relies on the fact that the handbook and the manual provide that employees may drive company cars and are expected to drive safely; provide for equal employment and have a policy against discrimination based on race, color, religion, creed, age, sex, national origin, ancestry or handicap; articulate hiring procedures of job applicants and instruct supervisors on handling applicants and employees; prescribe safety rules and wearing safety equipment in the workplace, such as shoes and goggles and require that Taylor sign a "Safety and Work Rule Acknowledgment and Substance Abuse Policy" form stating that he would practice good safety habits and not engage in substance abuse; provide for holidays, vacations, tuition reimbursement for pertinent educational enrichment and require that the employee's supervisor sign the reimbursement form; and maintain a job description for territory managers that requires employees to follow policies and procedures as prescribed by Cummins management.

For the same reasons that the disciplinary procedure does not alter Taylor's at-will status, these other provisions do not convert Taylor into a contractual employee. There is simply nothing in the language of these provisions stating or implying that Taylor's at-will status was altered. For instance, with respect to the use of company cars, employees are merely instructed to operate them safely, obey traffic regulations, use company cars for company business, and keep records when using company cars. With respect to the policy on discrimination, hiring/management procedures, and job description,

these policies and procedures merely provide that the company will not practice invidious discrimination, that management will comply with certain procedures in hiring and supervising employees, and what certain jobs entailed. As to safety, employees were simply reminded to practice safe work habits and required to sign a statement promising that they would observe company safety rules. As to holiday and vacation time, the handbook and manual merely recite official holidays and the procedure to follow in taking leave. Regarding the tuition policy, the handbook and manual state that the employer will reimburse employees for taking enrichment courses pertinent to work. We discern nothing in either the handbook or manual tending to establish that Taylor's at-will employment status was altered. Accordingly, Cummins was entitled to summary judgment. *See id.*

C.

Alternatively, we conclude that Cummins substantially complied with the disciplinary procedure; accordingly, even assuming *arguendo* that Taylor's at-will status was altered, he received the procedure to which he was entitled.[3] Vice President and General Manager of Cummins William Leggitt (Leggitt) met with Taylor on three separate occasions to discuss Taylor's poor work performance. On June 19, 1990, Leggitt informed Taylor that various customers were complaining about Taylor and warned Taylor to improve his performance. At a subsequent meeting, Leggitt again warned Taylor that his work performance was inadequate and must improve. Finally, on March 13, 1991, Leggitt met with Taylor for the purpose of terminating his employment. The disciplinary procedure permits deviations, provided any deviation is approved by a vice president. Here, the only deviation from the disciplinary procedure was that a form was not executed and placed in Taylor's file, but the entire disciplinary pro-

[3]Since we conclude, in the alternative, that Taylor received all the disciplinary procedure to which he was entitled under the handbook and/or manual, we need not discuss his assertions that oral representations and/or the commission agreement had the effect of altering his at-will employment status. As the text of this section demonstrates, we have indulged Taylor's position that his at-will employment status was altered, and even accepting this position, we conclude that his claim cannot succeed.

cess was conducted by the Vice President and General Manager. Any deviations, therefore, were proper. Here, not only was the deviation administrative in nature, but it was executed by a party charged with approving deviations. We are wholly persuaded that Cummins complied in substance with the disciplinary procedure. Accordingly, Taylor received all of the disciplinary procedure to which he was entitled. Taylor, therefore, cannot be heard to complain.

III.

We conclude that Taylor's at-will employment status was not altered. Even assuming that Taylor's employment status was contractual, we conclude further that Taylor received the benefit of the disciplinary procedure, and therefore even under the provisions of the handbook and/or manual, Cummins breached no employment contract in terminating Taylor. The judgment of the district court is affirmed.

AFFIRMED

APP. 2

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 4, 1995

No. 94-1596
CA-92-1850

ROBERT H. TAYLOR

Plaintiff - Appellant

v.

CUMMINS ATLANTIC, INCORPORATED

Defendant - Appellee

On petition for Rehearing with Suggestion for Rehearing in Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it

should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

APP. 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

ROBERT H. TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 3:92-1850-19BD
	)	
CUMMINS ATLANTIC, INC.,	)	
	)	
Defendant.	)	

ORDER

Defendant discharged plaintiff from employment for the stated reason of poor work performance. As a result, plaintiff filed this lawsuit alleging causes of action for breach of contract, nonpayment of wages in violation of the South Carolina Wage Payment Act (S. C. Code Ann. Sections 41-10-10 to -110), age discrimination in violation of the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. Sections 621-34) and the South Carolina Human Affairs Law ("SCHAL") (S.C. Code Ann. Sections 1-13-10 to -110), fraud, and

intentional infliction of emotional distress. This matter is now before the Court on defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. After carefully reviewing the record and the controlling legal principles, the Court concludes that the motion should be granted for the reasons set forth below.

I

Summary judgement is not "a disfavored procedural shortcut, but rather [it is] an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Summary judgment "provides a procedure with which to bypass a trial when the fact resolution process of trial would prove to be of no use in the disposition of the case." Mitchell v. Data General Corp., 12 F.3d 1310, ___ (4th Cir.

1993). When the moving party properly supports its motion showing that it is entitled to judgment as a matter of law, the party opposing the motion must present "affirmative evidence" to establish a genuine dispute of material fact which is necessary to defeat the summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257-58 (1986). In reviewing a motion for summary judgment, the Court is required to view any permissible inferences to be drawn from the underlying facts in the light most favorable to the non-moving party. Moore v. Winebrenner, 927 F.2d 1312, 1313 (4th Cir.), cert. denied, 112 S. Ct. 97 (1991). If after viewing the evidence in the light most favorable to the non-moving party, the Court finds that the non-moving party has failed to make a showing sufficient to establish the existence of an element essential to its case, and on which it will bear the burden

of proof at trial, the Court must grant summary judgment against that party. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883-84 (1990). "In short, the summary judgment procedure allows the court to forecast the proof at trial to determine whether consequential facts are in dispute, and if not, to resolve the case without a trial." Mitchell, 12 F.3d at ___.

II

Initially, the Court will consider plaintiff's claim for nonpayment of wages under the South Carolina Wage Payment Act, which requires an employer to pay all wages due to a separated employee within forty-eight hours of the time of separation or the next regular payday (not to exceed thirty days), S.C. Code Ann. Section 41-10-50; and which creates a civil action for violation of the Act. See S.C. Code Ann Section 41-10-80(C). In support of its motion on this claim, defendant has

submitted an affidavit of its company Controller, Terry Fisher, in which Mr. Fisher states that defendant has fully paid plaintiff all commissions to which he was entitled. During discovery, plaintiff failed to identify which commissions had not been paid and, in his opposition to the motion, plaintiff has failed to come forward with any evidence regarding this claim.[1] Based on the record which has been presented, the Court concludes that defendant is entitled to summary judgment

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[1]Plaintiff contends that defendant has not provided him with sufficient information to determine what commissions have not been paid and until he receives "the proper documents which are in the exclusive control of [d]efendant . . ., he cannot make the calculations necessary to provide the Court for a determination on this issue." Plaintiff's Memo. In Opp. Of Def.'s Mot., at 46. This case was filed in May 1992 and discovery closed on March 22, 1993. Plaintiff has had ample opportunity to discover evidence in support of this claim, yet he has completely failed to do so.

on this claim.

III

The Court next turns to plaintiff's intentional infliction of emotional distress claim, which defendant argues, inter alia, is precluded by the South Carolina Worker's Compensation Act. Defendant cites Dickert v. Metropolitan Life Insurance Company, 428 S.E.2d 700 (S.C. 1993), in which the South Carolina Supreme Court reaffirmed the principle that "an employee's action against a company for intentional infliction of emotional distress . . . [is] within the scope of the [Workers' Compensation] Act since [it] arise[s] from personal injury." Id. at 2701. The Dickert court noted that "[i]t is only when the tortfeasor/co-employee is the 'alter ego' of the employer that liability falls outside the scope of the Act." Id. With these principles in mind, the Dickert court "decline[d] to extend the

definition of alter ego to supervisory employees such as office manager and [held] that only 'dominant corporate owners and officers' may constitute alter egos." Id.

In light of Dickert, the Court concludes that plaintiff's claim for outrage must fail. Plaintiff has made no showing that the alleged outrageous conduct was committed by a "dominant corporate owner" of defendant. Indeed, plaintiff has not responded to this particular argument in its memoranda in opposition to the motion but, instead, has merely argued that defendant's actions are outrageous. Because plaintiff has failed to set forth facts to remove this case from the holding of Dickert, defendant is entitled to summary judgment on this claim.

IV

The Court will next consider plaintiff's claim of age discrimination

under the ADEA and the SCHAL,[2] which do not require an employer "to adopt a life of economic altruism and thereby immunize protected class members from discharge or demotion despite their poor performance," "Gairola v. Virginia Dep't of Gen. Servs., 753 F.2d 1281, 1287 (4th Cir. 1985); but instead, preclude an employer from treating employees less favorable because of age. Id. In order to establish a claim under

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[2]The ADEA makes it "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. Section 623(a) (1). The SCHAL contains a similar prohibition. See S.C. Code Ann. Section 1-13-80. Because there is little caselaw interpreting the SCHAL and because the SCHAL essentially follows the ADEA both procedurally and substantively in relevant respects, the Court will apply caselaw interpreting the ADEA to plaintiff's age discrimination claim under both statutes. Cf. Orr v. Clyburn, 290 S.E.2d 804, 806 (S.C. 1982) (holding that Title VII cases "are certainly persuasive if not controlling in construing the [SCHAL]").

these statutes, "a plaintiff must prove, with reasonable probability, that but for the age of the plaintiff, the adverse employment decision would not have been made. Age must have been a determining factor in the employment decision." Mitchell, 12 F.3d at ___. A plaintiff may prove that age was a determine factor in the adverse employment decision under ordinary standards of proof or under a proof scheme judicially created for use in Title VII cases and subsequently adapted for use in ADEA cases. E.E.O.C. v. Clay Printing Co., 995 F.2d 936, 940 (4th Cir. 1992).[3]

A.

In applying ordinary standards of

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[3]The Supreme Court created the Title VII analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); and Texas Dept. of Commun. Affairs v. Burdine, 450 U.S. 248 (1981); and recently clarified it in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742 (1993).

proof, plaintiff must establish the following elements in order to prevail: (1) he in age 40 or older, (2) he was discharged, and (3) the circumstances surrounding his discharge indicate that his age was a determining factor in the sense that but for defendant's motive to discriminate against him because of his age, he would not have been discharged. Clay Printing Co., 955 F.2d at 940-41. Under this scheme of proof, plaintiff may prove his case by introducing direct evidence of discrimination, which typically consists of statements made by the employer which specifically link the discharge to her age, see Moore v. City of Charlotte, 754 F.2d 1100, 1105 (4th Cir.), cert. denied, 472 U.S. 1021 (1985); or by introducing indirect evidence of discrimination, which typically includes, but is not limited to, "'proof of [his] general qualifications, from which the

inference of age discrimination may rationally be drawn independently of any age presumption.'" Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 235 (4th Cir. 1991) (citation omitted). To prevail on a claim of age discrimination based on indirect evidence requires proof that it is m "more probable than not" that age discrimination is the reason for the discharge. Id.

Plaintiff argues that he has presented both direct and indirect evidence of age discrimination. Specifically, plaintiff points to affidavits from several former employees who claim that defendant discriminatorily terminated them. The Court has reviewed these affidavits and find that they contain nothing more than conclusory allegations that defendant terminated them because of their age, among other reasons. Therefore, these affidavits are not probative of plaintiff's claim of

age discrimination.[4] In addition, plaintiff points to a change in defendant's commission schedule as being proof that defendant terminated him because of his age. However, plaintiff's wholly speculative theory concerning this commission change simply does not support his claim of age discrimination either factually or legally. In short, to the extent that plaintiff attempts to prove his case using ordinary standards of proof, the Court concludes that his claim of age discrimination must fail as a matter of law.

B.

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[4]Moreover, even if these affidavits were probative of discrimination generally by defendant, they are not probative to the issue of whether defendant discriminated against plaintiff. Cf Terrell v. Feldstein Co., 468 F.2d 910, 911 (5th Cir. 1972) (statistical evidence of discrimination against others "is not determinative of an employer's reason for the action taken against the individual grievant").

Plaintiff also argues that he can prove his claim of age discrimination under the Title VII scheme of proof, which first requires him to establish a prima facie case of age discrimination by showing that (1) he is age 40 or older, (2) he was discharged, (3) at the time of the discharge he was performing his job at a level that met defendant's legitimate expectations, and (4) following his discharge, he was replaced by someone of comparable qualifications under the age of forty. Mitchell, 12 F.3d at ___. The Court concludes that plaintiff has failed to establish a prima facie case under the Title VII scheme of proof requires proof that the employer replaced the employee with persons outside of the protected class. Therefore, because plaintiff has failed to make a prima facie showing of discrimination, the Title VII proof scheme inquiry ends, and defendant is entitled to

summary judgment on this claim. Gairola, 753 F.2d at 1288.

V.

The Court now will consider plaintiff's breach of contract claim. Plaintiff alleges that the pertinent terms of his employment contract were created by defendant's Supervisors Manual ("the Manual") and Employee Handbook ("the Handbook"), a commission agreement between plaintiff and defendant, and alleged oral assurances defendant made concerning plaintiff's employment, and that defendant breached these terms by discharging him. Defendant argues in support of its motion that plaintiff was an at-will employee subject to discharge at any time for any reason and, therefore, he may not prevail on this cause of action. Plaintiff admitted in his deposition that he was employed for an indefinite period of time. Therefore, under South Carolina law, his

employment contract is presumed to be for at-will employment. Small v. Springs Indus., Inc., 388 S.E.2d 808, 809 (S.C. 1990) ("Springs II"). When applicable, the doctrine of employment at-will "allows an employer to discharge an employee without incurring liability for good reason, no reason, or bad reason." Culler v Blue Ridge Elec. Co-op., Inc., 422 S.E. 2nd 91, 92 (S.C. 1992). Therefore, if the evidence in the record is uncontradicted that plaintiff's employment contract was for at-will employment, this cause of action must fail as a matter of law. Epps v. Clarendon County, 405 S.E.2d 386, 387 (S.C. 1991).[5]

A.

Plaintiff first contends that the

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[5]The right to terminate an at-will employee is not unlimited. Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985) (employer may not terminate at-will employee in violation of clear mandate of public policy). Ludwick is inapplicable here.

Manual and the Handbook altered his at-will employment status. Plaintiff relies on the opinion in Small v. Springs Industries, Inc., 357 S.E.2d 452, 455 (S.C. 1987) ("Springs I"), in which the court held that "a jury can consider an employee handbook, along with other evidence, in deciding whether the employer and employee had a limiting agreement on the employee's at-will status." Plaintiff contends that both the Manual and the Handbook contain procedures concerning discipline which were binding and were applicable to him, and which defendant did not follow in discharging him. In its motion, defendant argues inter alia that plaintiff's claim must fail because defendant did not distribute either the Manual or Handbook to plaintiff. Plaintiff attempts to counter this argument by asserting that it was not necessary for defendant to have distributed the Manual or the Handbook to him in order

for these documents to have altered his employment contract.[6]

A contract is "an agreement on sufficient consideration, to do or not to do a particular thing." Rabon v. State Finance Corp., 26 S.E. 2d 501, 502 (S.C. 1943). The employer-employee relationship

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[6]Many jurisdictions which allow Springs I-type actions require the employer to have distributed or otherwise intentionally published the handbook to the employee in order for the plaintiff to prevail. See, e.g., Tritle v. Crown Airways, Inc., 928 F.2d 81, 85 (4th Cir. 1990). The Springs I court implicitly acknowledged this principle. See 357 S.E.2d at 454-55 ("Unquestionably, Springs was under no duty to write and distribute the employee handbok;" "Once Springs voluntarily chose to publish the handbook;" "Having announced the policy"). Moreover, in the published South Carolina appellate opinions in which a plaintiff prevailed on a Springs I claim, the employer distributed or intentionally published the policy to the plaintiff. See Springs I, 357 S.E.2d at 453; Leahy v. Starflo Corp., 431 S.E.2d 567, 568 (S.C. 1993); Hannah v. United Refrig. Servs., Inc., 430 S.E.2d 539, 540 (S.C. App. 1993): Kumpf v. United Tel. Col. of the Carolinas, Inc., 429 S.E.2d 869, 870 (S.C. App. 1993).

for these documents to have altered his employment contract.[6]

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"'is necessarily contractual in character and to constitute one an employee it is essential that there shall be a contract of service.'" Holland v Georgia Hardwood Lumber Col, 51 S.E.2d 744, 746 (S.C. 1949) (citation omitted). Because a contract of employment is no different than any other type of contract, Richenbaker v Layton, 59 F. Supp. 156, 161 (D.S.C. 1945); the Court must look to general principles of contract law in order to analyze plaintiff's claim of breach of an employment contract. This is true even though plaintiff relies upon Springs I, since the holding in Springs I is unquestionably based on principles of contract law, Storms v. Goodyear Tire & Rubber Co., 775 F. Supp. 862, 866 (D.S.C. 1991),[7] specifically unilateral contract

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[7]The Springs I court relied upon Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980), in which the Michigan Supreme Court held that an employer can become contractually bound

principles:

> The employment agreement in this case, like most employment agreements, was a unilateral agreement. Springs made an offer or promise to hire Small in return for specified benefits and wages. Small accepted this offer by performing the act on which the promise was impliedly or expressly based. Springs' promise constituted the terms of the employment agreement. Small's action or forbearance in reliance on Springs' promise was sufficient consideration to make the promise legally binding. There was no contractual requirement that Small do anything more than

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based on principles of promissory estoppel. However, the Springs I court did not adopt the Toussaint majority's analysis but, instead, adopted the unilateral contract theory urged by three concurring justices. See 357 S.E.2d at 454 (citing Toussanit, 292 N.W.2d at 900 (Ryan, J. concurring)). The Michigan Supreme Court has expressed doubt as to the validity of the Toussaint majority's holding. See Rowe v. Montgomery Ward, 473 N.W. 2d 268, 269 (Mich. 1991) ("the [Toussaint] theory remains troubling because of those instances in which application of contract law is a transparent invitation to the factfinder to decide not what the 'contract' was, but what 'fairness' requires").

> perform the act on which the promise was predicated in order to legally bind Springs.

357 S.E.2d at 454.[8]

In order to prevail on his claim of breach of contract, plaintiff bears the burden of establishing the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 124 S.E.2d 602, 610 (S.C. 1962). An action for damages for breach of contract is thus predicated on the existence of the contract. Tidewater Supply Co. v. Industrial Electric Co., 171 S.E.2d 607, 608 (S.C. 1969). The essential elements of a contract are an offer, an acceptance, and

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[8]A unilateral contract is one "in which there is a promise on one side only; the consideration on the other side being executed." McMahan v. McMahon, 115 S.E. 293, 294 (S.C. 1992).

valuable consideration. Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co., 437 S.E.2d 122, 125 (S.C. App. 1993). "It is elemental . . . that before a party can recover for the breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on." Rabon v. State Finance Corp., 26 S.E.2d 501, 502 (S.C. 1943).

It necessarily follows that plaintiff cannot prevail on his breach of contract claim unless he can establish that defendant made an offer to him to alter the at-will nature of his employment. See Masonic Temple, Inc. v. Ebert, 18 S.E.2d 584, 587 (S.C. 1942) ("'[t]here can be no contract unless there is . . . an offer'" (citation omitted)). Under South Carolina law,

> [I] An offer is the manifestation of willingness to enter into a bargain, so made

> as to justify another person in understanding that his assent to that bargain is invited and will conclude it.
>
> [II] [A]n offer is judged by its objective manifestations, not by the mental reservations or subjective interpretations or intentions of the offeror.
>
> [III] An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act of a requested promise by the offeree, amounts to an offer.
>
> [IV] [An offer] to be binding, must be definite [and] must be one which is intended of itself to create legal relations on acceptance.

[I] Carolina Amusement Co., 437 S.E.2d at 125; [II] Noland Co. v. Graver Tank & Mfg. Co., 301 F.2d 43, 47 (4th Cir. 1962); [III] Broadway v. Jeffers, 194 S.E. 642, 645 (S.C. 1938); [IV] McLaurin v. Hamer, 164 S.E. 2, 5 (S.C. 1932) (citations omitted).

The Court finds from the evidence presented that plaintiff has failed to

establish that defendant made an offer to alter his at-will employment status. The evidence is undisputed that defendant did not distribute or intentionally publish either the Manual or the Handbook to plaintiff.[9] Therefore, even assuming that

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[9]Plaintiff relies upon Miller v. Schmid Labs., Inc. 414 S.E.2d 126 (S.C. 1992), for the proposition that it was not necessary for defendant to have distributed or published the Manual or the Handbook to him in order for these documents to alter his at-will status. In Miller, the court noted that "[i]t is certainly possible . . . for a company to unintentionally bind itself through an employee handbook." 414 S.E.2d at 127. This is not a novel proposition; indeed, the employer in Springs I did not intend to alter the employment contract in that case. However, while an employer may unintentionally bind itself through an employee handbook, there must be evidence to establish that the employer has done so -- that is, there must be evidence which establishes that offer. That evidence is wholly lacking in this case, as evidenced by plaintiff's deposition testimony:

Q: During your employment with [defendant] . . . were you ever issued any handbooks, manuals, policies, anything like that?

the Manual or the Handbook could be read as altering an employee's at-will status,[10] plaintiff may not base his breach of

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A: [by plaintiff] The books that I was given were insurance manuals, life insurance, that type of stuff. I don't know that there was an employee handbook, per se. There was some type of operation manual that the brance manager had, but we weren't encouraged to look at it.

Q: So it was a -- you're talking about some sort of policy manual written for branch managers?

A: Well, I've never read it. I knew it was there, but we really weren't encouraged to look at it. It was kept in the branch manger's office.

Q: So, other that its existence, you don't really know very much about it?

A: Other than just, you know, what rules you hear, and those kinds of things, and you can't put a lot of faith in rumors.

Deposition of Robert H. Taylor, at 27.

[10]Although it is not necessary for the disposition of this case, the Court finds that there is nothing in the Manual or the Handbook which can reasonably be read as altering plaintiff's at-will status.

contract claim on either of these documents because he has failed to make this basic showing on his contract claim.

B.

Plaintiff also contends that his commission agreement with defendant altered his employment at-will status. In regard to this contention, plaintiff relies upon two documents: (1) a 1990 commission schedule (which is actually nothing more that a chart) and (2) a three-page memorandum dated May 6, 1977, from defendant to plaintiff which confirms the parties' sales agreement. Plaintiff's reliance upon these documents is clearly misplaced since neither document contains any language which can be read to alter plaintiff's at-will employment status. Epps, 405 S.E.2d at 386-87 ("We have reviewed the handbook and find no provision concerning procedures for termination or any provision which might otherwise be

construed as altering an employee's at-will status"). Moreover, the 1977 agreement specifically states in the first paragraph on page one that the agreement "is not a contract and should not be viewed as such." See Springs I, 357 S.E.2d at 455 (noting employer's ability to utilize disclaimer to prevent its policies from altering the at-will relationship). For these reasons, plaintiff's breach of contract claim must fail to the extent that it is premised on the commission agreement.

C.

Plaintiff also argues that defendant made certain oral assurances concerning his employment which altered his at-will status. Plaintiff testified as follows in his deposition concerning this matter:

> Well, at every meeting we went to, they would give you goals; they wanted you to sell a million dollars worth of engines this year and it was understood that if I did, I got my commission, and I'm

> concluding that that was an oral agreement; You do a million dollars or you do this, or you do that, and we're going to pay you your commission. If you don't we're going to fire you. Now, that was -- that's what I'm considering an oral agreement.

Deposition of Robert H. Taylor, at 85. In Wadford v Hartford Fire Insurance Company, C.A. No. 3:87-2872-15 (D.S.C. Aug. 11, 1988), then District Judge (now Circuit Judge) Clyde Hamilton rejected a similar claim:

> Plaintiff attempts to convert a statement informing her of one prerequisite of continued employment (i.e., the production of a certain amount of bond business) into an overall assurance that, as long as she met that prerequisite, her relationship with Hartford could never change. This is a quantum leap which [the employer's] statements will not support. [The employer's] statements simply informed her that her job would be terminated if production was not forthcoming. There is nothing in the statements to indicate that the job could not be terminated for other reasons as well. In short, an

> affirmative statement of one job requirement cannot be realistically interpreted as an assurance that it is the only job requirement and that the company will forego its ability to reorganize of redirect its work force as long as the employee meets that single job requirement. Nor does the specification of a single job requirement limit the company's right to terminate . . . the employee for other reasons in the future.

Pp. 15-16. The Court finds Judge Hamilton's analysis to be applicable here. Consequently, plaintiff may not base his breach of contract claim on the alleged oral assurances noted above.

VI

Finally, the Court will consider plaintiff's fraud claim, which defendant argues must fail because plaintiff has failed to offer proof that it made any representations to plaintiff that are sufficient to constitute fraud. The first element which a plaintiff must prove in an action for fraud is that the defendant made

a representation to him. First State Sav. & Loan v.Phelps, 385 S.E.2d 821 (1989). Plaintiff contends that defendant "represented that it had a handbook and manual that applied to employees that would be fairly and consistently applied and that each employee would know under what conditions and for what reasons they would be terminated." Plaintiff's Memo. In Opp. Of Def.'s Mot., p 51. Because plaintiff has failed to come forward with evidence to support his allegation, this claim must fail as a matter of law.

VII

Based on the foregoing, the Court hereby **ORDERS** on this the 28th day of February, 1994, at Columbia, South Carolina, that defendant's motion for summary judgment be **GRANTED**.

(Signature)
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

ROBERT H. TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	C.A. No.3:92-1850-19BD
	)	
	)	
CUMMINS ATLANTIC, INC.,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on plaintiff's "Motion for Reconsideration" of the Summary Judgment entered in favor of defendant on March 1, 1994, in which plaintiff seeks reconsideration of the Court's ruling on his breach of contract claim. Plaintiff asserts Rules 52 and 59 of the Federal Rules of Civil Procedure as the basis for the motion. The Court notes that despite the frequent use of the term "motion for reconsideration" in federal court, "(t)he Federal Rules do not

recognize a 'motion for reconsideration' in haec verba." Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 173 (5th Cir. 1990). While Rule 52 is clearly inapplicable, the Court finds that the motion is actually a motion to alter or amend the judgment under Rule 59(e), and the Court shall treat it as such. See Dove v. Cadesco, 569 F.2d 807, 809 (4th Cir. 1978).

Rule 59(e) of the Federal Rules of Civil Procedure provides a mechanism for an aggrieved party to petition the Court to alter or amend a judgment under certain limited circumstances. The purpose of a Rule 59(e) motion "is to allow the court to reevaluate the basis for its decision." Keyes v. National R.R. Passenger Corp., 766 F. Supp. 277, 280 (E.D. Pa. 1991). Because of the interests in finality and conservation of judicial resources, Rule 59(e) motions should be granted sparingly.

Pennsylvania Ins. Guar. Ass'n v. Trabosh, 812 F. Supp. 522, 524 (E.D. Pa. 1992). Thus, Rule 59(e) motions "are not at the disposal of an unsuccessful party to 'rehash' the same arguments and facts previously presented, "Keyes, 766 F. Supp. at 280; and "cannot be used to raise arguments which could, and should, have been made before the judgment issued, "F.D.I.C. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); or to submit evidence which should have been previously submitted. Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989). Instead, a motion may be properly made under Rule 59(e) for only one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. Hutchinson v. Staton, 994 F.2d 1076, 1081

(4th Cir. 1993); Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1419 (D. Md. 1991).

The Court has carefully reviewed the record in this case and finds no basis for altering or amending the Summary Judgment. Plaintiff has merely rehashed the arguments and facts that the Court has found to be insufficient as a matter of law to support his breach of contract claim. Therefore, the Court hereby ORDERS on this 29th day of March, 1994, at Columbia, South Carolina, that the motion be DENIED.

(Signature)
DENNIS W. SHEDD
UNITED STATES DISTRICT JUDGE

RULE 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion for Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all

the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be

entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)